83-1957

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

BRIGGS & STRATTON CORPORATION,
a Delaware corporation, and
MICHAEL HAMILTON,

Petitioners,

v.

MALCOLM BALDRIGE, Secretary of
the United States Department of
Commerce et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ELWIN J. ZARWELL
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May 1984

20 pp

QUESTIONS PRESENTED

Petitioners hereby join in the petition for Writ of Certiorari heretofore filed by The Trane Company, et al. as petitioners for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in respect of appeals consolidated with the appeals of these petitioners before the United States Court of Appeals for the Seventh Circuit and subject to the same judgment of that court which issued on February 24, 1984. In respect of joining the petition of The Trane Company, et al., these petitioners hereby adopt, except as augmented herein, the portions of the petition of The Trane Company, et al. denominated: QUESTIONS PRESENTED; OPINIONS BELOW; JURISDICTION; STATUTES AND REGULATIONS INVOLVED; STATEMENT OF THE CASE; REASONS FOR GRANTING THE WRIT; and, CONCLUSION.

The questions presented in The Trane Company petition are also presented here. In addition, the following question is presented:

> Where the applicable statute (Export Administration Act of 1979) provides that it is unlawful to furnish information with intent to comply with, further, or support a boycott, have the regulations (Export Administration Regulations) properly interpreted that statutory provision by conclusively presuming such intent from the mere act of furnishing truthful business information in response to a questionnaire issued by a boycott office where, because of the character of the responder as a component manufacturer who does business in Israel, (a) not responding to the questionnaire is likely to result in loss of world-wide business and an expansion of the effect of the boycott; and, (b) response would not expand the effect of the boycott?[1]

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[1] In addition to Malcolm Baldrige, the other Respondents are Lionel H. Olmer, Under Secretary for International Trade of the United States Department of Commerce, William French Smith, Attorney General of the United States, and Ronald Reagan, President of the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Briggs & Stratton Corporation and Michael Hamilton respectfully pray that a Writ of Certiorari issue to review the judgment and decision entered by the United States Court of Appeals for the Seventh Circuit on February 24, 1984, rehearing denied March 26, 1984.

OPINIONS BELOW

In addition to the opinions below reflected in The Trane Company petition and reprinted as appendices to such petition, the Court of Appeals for the Seventh Circuit denied the petition of these petitioners for rehearing on March 26, 1984; a copy of that unpublished order appears as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 24, 1984. A timely petition for rehearing was denied on March 26, 1984. This petition for certiorari has been filed within 90 days of the date of that denial. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1) and Rule 22(3) of the Supreme Court Rules.

STATUTES AND REGULATIONS INVOLVED

The same constitutional, statutory and regulatory provisions as found in The Trane Company petition related to this petition.

STATEMENT OF THE CASE

(a) Nature of the Case

Briggs & Stratton Corporation and Hamilton, one of its officers, hereinafter collectively referred to as "Briggs", like The Trane Company, et al., commenced an action in the District Court seeking declaratory and injunctive relief against the Department of Commerce Regulations' interpretation of the Export Administration Act asserting that the interpretation is wrong and if sustained renders the statute itself unconstitutional as applied to Briggs under the First, Fifth and Ninth Amendments. All material facts were stipulated. The parties filed cross motions for summary judgment. Briggs requested that the District Court grant its motion for summary judgment and declare the interpretation of the Act by the Regulations void. In the event the District Court sustained that interpretation, Briggs requested that the District Court declare the Act itself unconstitutional. In either event, Briggs requested that the District Court enjoin the government from enforcing the Act, as interpreted, against Briggs.

In a "Decision and Order" dated May 4, 1982, District Judge Myron L. Gordon granted the defendants-appellees' motion for summary judgment and denied Briggs' motion for summary judgment. In a "Decision and Order" dated August 4, 1982, the same judge denied Briggs' motion for reconsideration. These Decisions and Orders are reported at 539 F.Supp. 1307 and 544 F.Supp. 667.

The Court of Appeals after discussing the constitutional questions jointly raised by all participants in the consolidated appeal, affirmed, adopting, without discussion, the reasoning of the District Court as to the additional question presented by this petition here and solely by these petitioners below.

(b) Statement of Facts

Like in The Trane Company case, the parties here have stipulated the facts and the stipulation is reprinted exclusive of exhibits as Appendix B.

The factual background out of which the Briggs case arises is similar to that of the background in Trane in that both cases have their setting against the Arab boycott situation, the plaintiffs have received boycott questionnaires, blacklisting is probable as to all parties upon failure to answer and the Department of Commerce has taken the position that answers to the questionnaires may not be made. However, there is one significant difference between the Briggs and the Trane situations from a statutory and regulatory interpretation standpoint dealing with the question of intent. Briggs does not manufacture or sell an end product; it manufactures only components for incorporation in an end product. The products manufactured by Briggs' customers are usually manufactured in large quantities using assembly line techniques in which customers design their products to use a particular engine model and are not able to change engines dependent upon the destination of a particular order.

Manufacturers in Australia, England, France, Germany, Japan, the United States and other countries sell products powered by Briggs engines to customers all over the world. The Arab countries are a segment and only a minor volume segment of this worldwide market. Because Briggs has been placed on some Arab country blacklists, and because of the standardization by its customers on a particular engine model, a number of its customers have notified it that they can no longer use its engines as components of products they will ship not only to the Arab countries but to all other countries as well.

Because of the unique character of Briggs as a component manufacturer whose customers standardize on the components they

in turn incorporate in end products, the effect of Briggs being unable to answer Arab inquiries, if the failure to answer results in blacklisting of Briggs' products in Arab countries, is to give the blacklisting of Briggs' substantially worldwide effect due to the fact that Briggs' customers will standardize on other engines, thus preventing the sales of Briggs engines as components of their products throughout the customers' trading area, which normally extends into many marketing areas, only a small part of which is found in the League of Arab States. Thus failure to answer the questionnaire extends the impact of the boycott; answering limits the impact of the boycott. Surely answering in such circumstances cannot be intended to further, support, or comply with the boycott.

REASONS FOR GRANTING THE WRIT

In addition to the reasons for granting the writ reflected in The Trane Company petition, examination of the nature of the business transacted by the parties to these petitions reflects that the entire spectrum of the manufacturing capabilities of the United States are involved, from those of the conglomerate manufacturer, United Technologies, which manufactures sophisticated major weapons systems, among other things, through The Trane Company which manufactures consumer products in the form of air conditioning devices, as well as including a component supplier, Briggs & Stratton Corporation, which is reflective of all of those companies who only make parts which other manufacturers in turn use to manufacture end products. Not only is the totality of United States manufacture and the export of their products before the court in a constitutional setting, but also the questions presented by this precise petition relating to a component manufacturer and the interpretation of the Export Administration Act by the Export Administration Regulations in the setting of a component manufacturer, has never been passed on by a court. Rather, the district court bypassed the question after first alluding to it in favor of a discussion of the broad constitutional questions and the Court of Appeals by adopting the decision and reasoning of the district court in respect of that question, likewise, never met the question. This court, for the first time, will be looking at the question of whether or not the regulations do deem intent out of the statute and if so, whether that can be done constitutionally.

Congress passed a law which authorized the adoption of regulations prohibiting:

> Any United States person. . .from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation.
>
> (D) Furnishing information about whether any person, has, has had, or proposed to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. . . .

50 U.S.C. App. §2407(a) (emphasis added).

The offense defined by the statute has two elements: one, furnish information, and two, do so with intent to comply with, further or support the boycott. However, the regulations "interpret" the intent requirement out of the statute by "deeming" it to exist:

> Reason or purpose can be proved by circumstantial evidence. For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he knowingly supplies that information in response, he clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes.

15 C.F.R. § 369.1(e)(5) (1981) (emphasis added).

Astonishingly, and without statutory authority, the regulations drop the statutory requirement of intent by conclusively presuming intent in any case in which a "knowing. . .response" is supplied. Intent to comply with the boycott is presumed because Briggs knowingly furnishes information.

The regulators leap from the assertion that circumstantial evidence may be used to prove intent to their own verdict that, in all cases, a response to a request shall be "deemed" sufficient to prove beyond a reasonable doubt intent to comply with a boycott. Thus, intent to comply with the boycott is conclusively presumed from a knowing response to a request for information. But the statute only prohibits furnishing information if done with intent to comply with, further or support a boycott; it does not prohibit furnishing of information to anyone without such intent. By administrative fiat, the necessary element of intent to comply with, further or support the boycott is read out of the statute; the regulations presume the requisite statutory intent from the fact of furnishing information. The fact of furnishing information alone thereby becomes a criminal act regardless of disagreement with the boycott and for that matter regardless of the fact that objective business dealings which disregard the boycott are present, objective dealings which demonstrate the nonexistence of the proscribed statutory intent.

This conclusive presumption of intent, adopted by administrative fiat is contrary to the plain meaning of the statute and contravenes one of the most basic principles in our system of justice: that every element of a criminal offense must be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). No element may be presumed to exist. A presumption of intent, even when rebuttable, violates the constitution. Sandstrom v. Montana, 442 U.S. 510 (1979); Harris v. Israel, 515 F.Supp. 568 (E.D. Wis. 1981). Here, the presumption is made irrebuttable. Clearly, that presumption cannot stand. "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." Morissette v. United States, 342 U.S. 246, 274 (1952). See also, Sandstrom v. Montana, supra; United States v. United States Gypsum Co., 438 U.S. 422 (1978).

CONCLUSION

For the reasons stated in The Trane Company petition, the Writ of Certiorari should be granted both in that case and in this case. In addition, this case presents the inadvertent and tacit approval of a regulatory scheme which causes an interpretation of a statute in a manner to create unconstitutionality in that statute pursuant to the decisions of this Court thereby rendering such tacit approval in conflict with the decisions of this Court.

The Petition for Certiorari sought herein should be granted.

Respectfully submitted,

ELWIN J. ZARWELL
SAMUEL J. RECHT
CAROLYN A. GNAEDINGER

Attorneys for Petitioners
Briggs & Stratton Corporation
and Michael Hamilton

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 26, 1984.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

BRIGGS & STRATTON CORPORATION and MICHAEL HAMILTON, Plaintiffs-Appellants,	Appeal from the United States District Court for the Eastern District of Wisconsin.
Nos. 82-2112, 82-2392 vs.	No. 80 C 721
MALCOLM BALDRIGE, Secretary of the United States Department of Commerce, et al., Defendants-Appellees.	Myron L. Gordon, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX B

STIPULATED FACTS

The parties have stipulated the facts:

1. Briggs & Stratton Corporation ("Briggs") is a Delaware corporation, licensed to do business in the State of Wisconsin, which has its principal office and place of business in the Eastern District of Wisconsin and as a manufacturer of internal combustion engines, has its corporate headquarters at 3300 North 124 Street in the City of Wauwatosa, Wisconsin 53222. Briggs presently manufactures products which are exported by Briggs' customers to Kuwait, Saudi Arabia, and other states which are members of the League of Arab States, primarily as components of equipment manufactured by Briggs' customers; the only direct import of Briggs' products to Arab States being for repair or replacement purposes and being insignificant in amount. Briggs' sales to persons who in turn export their products incorporating Briggs' engines to states which are members of the League of Arab States amounted to in excess of $15,000,000 in Briggs' most recently completed fiscal year ended June 30, 1980. Briggs believes that such sales for the fiscal year ending June 30, 1981 would exceed $15,000,000 but for the fact that some members of the League of Arab States have blacklisted Briggs. Briggs is making active efforts further to increase such sales and believes that there are good prospects for such increases. Such sales are profitable and currently account for the employment of in excess of 100 persons by Briggs in the United States, principally at its manufacturing plant in Wauwatosa, Wisconsin.

2. Engines manufactured by Briggs are not end products; rather they are the means to provide power for an end product. Because Briggs' engines are not end products but rather power components of another manufacturer's end product, Briggs makes the vast majority of its sales to end product manufacturers who in turn install the Briggs engine on the end product they manufacture. It is that end product that finds its way through sales channels to the consumer. Briggs does not manufacture or sell an end product; it manufactures only components for incorporation in an end product.

3. The products manufactured by Briggs' customers are usually manufactured in large quantities using assembly line techniques and placed in inventory awaiting shipment to subsequently determined destinations. For that reason, customers design their products to use a particular engine model and are not able to change engines dependent upon the destination of a particular order.

4. Manufacturers in Australia, England, France, Germany, Japan, the United States and other countries sell products powered by Briggs engines to customers all over the world. The Arab countries are a segment and only a minor volume segment of this worldwide market. Because Briggs has been placed on some Arab country blacklists, and because of the standardization by its customers on a particular engine model, a number of its customers have notified it that they can no longer use its engines as components of products they will ship not only to the Arab countries but to all other countries as well.

5. If called upon to testify, witnesses for plaintiffs would testify that engines in quantity sufficient to supply the foreign market similar to those manufactured by Briggs are available from manufacturers in such countries as Japan, Germany, France, England and Italy. The Government has no information contrary thereto, and the Court may act upon this stipulation in respect thereof with the same effect as though such witnesses had so testified.

6. The League of Arab States is composed of approximately 20 Arab states. On December 11, 1954 its council approved a resolution recommending an economic boycott of the state of Israel. Approximately 14 Arab states enforce the boycott generally, although the degree to which the boycott is enforced in each of those 14 states varies widely. Some Arab states have published implementing regulations and many have not. Some states enforce the boycott principles more conscientiously than others. The League of Arab States formed an organization called the Central Boycott Office, with headquarters presently in Damascus, Syria, which facilitates communications among the boycott offices of the individual boycotting states and makes recommendations concerning enforcement of the boycott to the individual states. The Central Boycott Office itself does not "blacklist" companies or persons, nor does it take direct enforcement action against "blacklisted" companies or persons. Decisions about "blacklisting" and its consequences are made by individual boycotting states.

7. Israel is a country friendly to the United States and is not itself the object of any form of boycott pursuant to United States law or regulation.

8. The economic boycott of Israel, enforced by member states of the League of Arab States in varying degrees, may include banning the importation into such member state of products manufactured by, or banning the importation into such member state of products containing substantial components manufactured by, as well as a ban on dealing with, any firm which has been blacklisted by reason of perceived or suspected activities deemed to be inconsistent with the purported "General Principles for the Boycott of Israel" (June 1972), published by the Central Boycott Office and the League of Arab States [Exhibit A]. One such perceived or suspected activity, according to those purported "General Principles," is the failure to respond to a request for information about the relationships of that firm or its affiliates with Israel. But for the existence of provisions of the Export Administration Act and the Regulations which prohibit the providing of such information if all jurisdictional tests are met and no specific exception to the prohibition exists, Briggs would respond to requests for such information from states which are members of the League of Arab States or persons therein, in order to preserve and expand its sales of components to exporters to such countries and the resulting profits and employment opportunities.

9. Michael Hamilton ("Hamilton") is Vice President, International Sales, of Briggs. He is a permanent resident alien who resides at 12530 Gremoor Dr., Elm Grove, Wisconsin 53122. He is the official of Briggs who in the ordinary course of business would respond to requests for information from member states of the League of Arab States. He devotes approximately 100 percent of his working time to matters related to Briggs' export business, a substantial part of which has been and would continue to be adversely affected by Briggs' blacklisting by one or more Arab states.

10. Malcolm Baldrige is the duly appointed Secretary of Commerce of the United States. He is authorized to impose the sanctions specified in Section 11 of the Export Administration Act, 50 U.S.C. App. §2410, including civil penalties of up to $10,000 for each violation of the Export Administration Act or the Regulations, and revocation or suspension of the authority to export goods. The President of the United States has also delegated to the Secretary cer-

tain power, authority, and discretion conferred upon him by the Export Administration Act, including the powers and duties to carry out prohibitions on the furnishing of information relating to foreign boycotts.

11. Lionel H. Olmer is the duly appointed Under Secretary for International Trade of the United States Department of Commerce. He is an "officer or employee of such department . . . . specifically designated by the head thereof" within the meaning of Section 7(a) of the Export Administration Act, 50 U.S.C. App. §2410 (c)(1), and as such may impose the civil sanctions provided for in Section 11(c) of the Export Administration Act for each violation of that Act or of the Regulations.

12. William French Smith is the duly appointed Attorney General of the United States. As such, he is charged with the enforcement of criminal sanctions under the Export Administration Act. These sanctions, as set forth in Section 11 of the Act, 50 U.S.C. App. §2410, include fines of not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisonment for not more than five years or both for violation of the Export Administration Act or the Regulations.

13. Ronald Reagan is the duly elected President of the United States. He is authorized under provisions of the Export Administration Act to effectuate the policies of the Export Administration Act, including those expressed in Section 8(5), 50 U.S.C. App. §2402(5), concerning the supply of information relating to a boycott. He is further directed under Section 8(a)(1) of the Export Administration Act, 50 U.S.C. App. §2407(a)(1), to issue rules and regulations interpreting the Export Administration Act.

14. Commerce Department officials have advised plaintiff Briggs that under the facts herein set forth, any answer made by plaintiff Briggs which is responsive to the request hereinafter described would contravene the Regulations herein described and that defendants would, upon learning that any information had been furnished by Briggs or on its behalf, in contravention of the Regulations, so construed, seek to impose one or more of the above described penalties.

15. On or about May 9, 1977, plaintiffs received a letter [Exhibit B] from Georges A. K. Kabbabe, the distributor of plaintiff Briggs' products in Syria, enclosing a document having thereon a list of questions [Exhibit C] from the "Economical Department" [Ministry of Economy and Foreign Trade] of Syria. That document, Exhibit

C, is a request for information response to which is proscribed by existing regulations interpreting existing federal law as is hereinafter explained, if all jurisdictional tests are met and no specific exception to the prohibition exists. Briggs sought to respond by letter to the Syrian inquiries prior to the time that answers thereto were proscribed by federal law or regulations. [Exhibit D] However, Briggs' attempted response failed because it was not authenticated by an Arab consular officer. When the same was subsequently returned for such authentication, the Regulations interpreting then existing federal law prevented Briggs from furnishing any answer, authenticated or not. [Exhibit E]

16. Briggs, subsequent to its failure to return the authenticated answers within the time limit set by the "Economical Department" of Syria, was blacklisted by Syria and subsequently by Saudi Arabia, Bahrain, Oman and Kuwait, other member states of the League of Arab States. [Exhibits F and I] In order to preserve and expand its business, profits, and employment, Briggs believes it is necessary to and desires to answer and would answer the described inquiries if it were not that it fears being subjected to the penalties set forth in Section 11 of the Export Administration Act of 1979; such belief being based on its interpretation of the tenor and import of the Regulations adopted thereunder as aforesaid.

17. Briggs believes it was so blacklisted for failing to answer the inquiries of the "Economical Department" of Syria and Briggs also believes that if Briggs does not answer the questionnaire, it will remain blacklisted and/or boycotted by Syria, Kuwait, Bahrain, Saudi Arabia, Oman and soon thereafter may be blacklisted or boycotted by other countries participating in the Arab boycott. According to paragraph "15, First, g" of the "General Principles for Boycott of Israel" published in June, 1972, by the League of Arab States' Head Office for the Boycott of Israel, in Damascus, Syria, blacklisting occurs under regulations issued by the Arab countries if, within the appropriate period, a company does not reply to questions submitted to it.

18. Notwithstanding the fact that Briggs has failed to answer the inquiries of the Syrian "Economical Department," Briggs and the Government have learned that at a meeting of Arab boycott officials in Damascus in or about April, 1981 it was decided to lift the blacklisting sanctions previously imposed on Briggs. Briggs has received notice confirming this action, and at the present time end

products containing components manufactured by Briggs are being granted entry into all Arab States. [Exhibits G and H]

19. As a result of being blacklisted and/or boycotted, Briggs has lost a portion of and may lose additional sales and profits, as described in paragraph 1 hereof. [Exhibits I and J] The employment of in excess of 100 persons in the United States depends on these sales.

20. Hamilton wishes to respond to the questions referred to in pursuance of his duties as a Briggs official. Hamilton fears that the result of a failure by him to respond will be the continued blacklisting and/or boycotting of his employer Briggs.

21. The plaintiffs are not aware of any basis for Briggs being blacklisted under the purported "General Principles for Boycott of Israel" described above except for the failure and refusal to answer the communication from the "Economical Department" of Syria above described, though Briggs has in the past and intends in the future to trade with persons in Israel and in all other respects conduct its business without regard to such purported "General Principles".

22. Because of the unique character of Briggs as a component manufacturer whose customers standardize on the components they in turn incorporate in end products, the effect of Briggs being unable to answer Arab inquiries, if the failure to answer results in blacklisting of Briggs' products in Arab countries, is to give the blacklisting of Briggs substantially worldwide effect due to the fact that Briggs' customers will standardize on other engines, thus preventing the sales of Briggs' engines as components of their products throughout the customers' trading area, which normally extends into many marketing areas. only a small part of which is found in the League of Arab States.

23. Because the enforcement of the economic boycott of Israel by Arab League states is haphazard, it is impossible to predict with certainty what action a member state will take in a specific circumstance. Nevertheless, the Government agrees with Briggs that the failure to answer an inquiry from an authority charged with the boycott of Israel by the League of Arab States increases the risk or likelihood of being blacklisted by one or more Arab states. However, persons have been allowed to trade with one or more members of the League of Arab States, although subject to a trade ban or blacklisting by one or more members of the League of Arab

States. Factors affecting a decision, however temporary, to allow a blacklisted firm or person to trade with or in a boycotting country may include one or more of the following: "national interest" determinations; on the business interests of an influential Arab importer; "flexibility" on the part of local boycott offices; goods and services particularly desired by Arab governments; "selective exceptions policies" on the part of local boycott offices; "equipment necessary to complete projects under way"; and decisions in some countries to enforce only the primary boycott of Israel. Persons have been blacklisted by one or more members of the League of Arab States but not by others, and hundreds of persons who were blacklisted by one or more members of the League of Arab States, or recommended for such treatment by the Central Boycott Office, were subsequently removed from the blacklists. Most cases of deblacklisting have come to public attention through routine announcements in the gazettes of the member states without any reason given for the action.

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Nos. 83-1921 and 83-1957

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE TRANE COMPANY AND MAURICE BOUCHARD, PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

BRIGGS & STRATTON CORPORATION, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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RICHARD K. WILLARD
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QUESTIONS PRESENTED

1. Whether provisions of the Export Administration Act of 1979 and implementing regulations violate the First Amendment by prohibiting petitioners from providing Arab states engaged in a boycott of Israel with certain information about their business activities related to Israel.

2. Whether the regulations' definition of intent to further the boycott is consistent with the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1921

THE TRANE COMPANY AND MAURICE BOUCHARD, PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

No. 83-1957

BRIGGS & STRATTON CORPORATION, ET AL., PETITIONERS

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a)[1] is reported at 728 F.2d 915. The opinion of the district court in No. 83-1921 (Pet. App. 6a-27a) is reported at 552 F. Supp. 1378. The opinions of the district court in No. 83-1957 (Pet. App. 28a-52a) are reported at 539 F. Supp. 1307 and 544 F. Supp. 667.

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[1] "Pet. App." refers to the appendix to the petition in No. 83-1921 unless otherwise noted.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1984 (Pet. App. 53a-54a). A petition for rehearing was denied on March 26, 1984 (83-1957 Pet. App. A1). The petition for a writ of certiorari in No. 83-1921 was filed on May 24, 1984. The petition for a writ of certiorari in No. 83-1957 was filed on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Export Administration Act of 1979 declares that "[i]t is the policy of the United States * * * to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States" and "to encourage and, in specified cases, require United States persons engaged in the export of goods or technology * * * to refuse to take actions, including furnishing information * * * which have the effect of furthering or supporting the restrictive trade practices or boycotts * * * imposed by any foreign country against a country friendly to the United States." 50 U.S.C. App. (Supp. V) 2402(5)(A) and (B).[2] The Act further provides that, "[f]or the purpose of implementing the[se] policies" (50 U.S.C. App. (Supp. V) 2407(a)(1)):

> The President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by

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[2]The authority granted by the Export Administration Act of 1979 expired on March 30, 1984, but its prohibitions are still in force by virtue of Exec. Order No. 12470, 49 Fed. Reg. 13099 (1984).

a foreign country against a country which is friendly to the United States * * *:

* * * * *

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship * * * with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country.

The implementing regulations provide, in part (15 C.F.R. 369.2(d)):

(1) No United States person may furnish or knowingly agree to furnish information concerning his or any other person's past, present or proposed business relationships:

(i) With or in a boycotted country;

(ii) With any business concern organized under the laws of a boycotted country;

(iii) With any national or resident of a boycotted country; or

(iv) With any other person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

2. The Arab boycott of Israel has been in effect for over 30 years. It has primary, secondary, and tertiary aspects. The primary boycott consists of a refusal by 16 Arab nations to deal with Israel. The secondary boycott is a refusal by 13 Arab states to deal with (and a prohibition against their residents' dealing with) persons or firms that,

although not Israeli, have been blacklisted because of their dealings with Israel. The tertiary boycott involves a refusal to deal with firms that deal with blacklisted firms. Pet. App. 58a-59a; 83-1957 Pet. App. A3-A4.

Petitioners are two United States corporations and one official of each of those corporations. They received questionnaires, from nations participating in the Arab boycott, demanding information concerning their business activities and relationships in Israel. It is undisputed that the Export Administration Act and its implementing regulations prohibit them from answering these questionnaires and that their refusal to answer increases the likelihood that they will be blacklisted by Arab states. Pet. App. 2a.

Petitioners in No. 83-1921 brought suit in the United States District Court for the Western District of Wisconsin; petitioners in No. 83-1957 brought suit in the United States District Court for the Eastern District of Wisconsin. All the petitioners asserted that the prohibition on furnishing information in response to the boycott questionnaires violates the Constitution; petitioners in No. 83-1957 also asserted that the regulations were not authorized by the statute. Both district courts ruled against petitioners (Pet. App. 6a-52a). The court of appeals consolidated the appeals and affirmed (*id.* at 1a-5a).

ARGUMENT

1. Petitioners' principal contention is that the prohibition against answering the questionnaires violates their rights under the First Amendment. In particular, petitioners contend that if they were to answer the questionnaires they would be engaging in speech that is entitled to full protection under the First Amendment, and that the Export Administration Act and its implementing regulations cannot be justified as a restriction on fully protected speech.

In our view, the activity in which petitioners propose to engage — responding to the questionnaries — should not be regarded as speech at all. If it is regarded as speech it plainly should be viewed as commercial speech, and the courts below were correct in concluding that the restrictions challenged by petitioners do not violate the First Amendment.

a. The Arab boycott of Israel is activity by foreign governments that Congress has specifically declared to be contrary to the interests of the United States. As all the courts below found (see Pet. App. 11a, 19a, 20a; compare *id.* at 2a with *id.* at 48a), petitioners would be directly contributing to the success of the boycott if they provided the information sought in the questionnaires. That is because the secondary and tertiary boycotts would be impossible if the participating states could not determine which firms conducted business with Israel or with other blacklisted organizations; therefore, to the extent it is more difficult and costly for the boycotting nations to obtain this information, they will be deterred from conducting the boycott. It is apparent — indeed, petitioners in No. 83-1921 stipulated (*id.* at 63a) — that it will be less costly for the boycotting nations to obtain the information if firms supply it on demand.

Moreover, if petitioners — who expect that the boycotting nations will find their answers to the questionnaires acceptable and will continue to deal with them (see Pet. App. 3a) — are free to respond to the questionnaires, petitioners' competitors will be placed under pressure to conform to the boycotting states' prohibitions against dealing with Israel or with blacklisted firms; otherwise the competitors would not be able to give "acceptable" answers. By contrast, if no American firm is permitted to furnish the information petitioners seek to provide, the boycotting states will find it more difficult to force American firms to

compete in attempting to satisfy the demands of the boycott. As Congress explained in the legislative history of the anti-boycott provisions of the Export Administration Act (S. Rep. 95-104, 95th Cong., 1st Sess. 25 (1977)):

> [T]he prohibition on furnishing information about who does and proposes to do business with a boycotted country or blacklisted person * * * [is] necessary to prevent a boycotting country from using U.S. persons to supply information necessary to boycott enforcement. Such information may very well be available through other sources, * * * [b]ut there is little justification for permitting U.S. persons to supply information when they know it is being sought for boycott enforcement purposes. To do so would be to sanction active complicity in boycott implementation.

There is no First Amendment right to aid or abet an unlawful scheme or a scheme that is contrary to the foreign policy of the United States. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language * * *." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Petitioners would, for example, have no First Amendment right to provide information that facilitated a price-fixing conspiracy. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978); *United States* v. *Container Corp.*, 393 U.S. 333 (1969). Indeed, "[n]umerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 ([2d Cir.] 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), and employers'

threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969)." *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

The supplying of the information petitioners seek to provide has been determined by Congress to further a scheme that is similarly inimical to important national interests. As the district court in No. 83-1957 explained, in an opinion adopted by the court of appeals (Pet. App. 46a; see *id.* at 2a):

> The claim to protected first amendment rights in the free flow of information seems out of place in the context of the instant suit. [Petitioners] do not challenge a statute that prohibits them from presenting the public with price and product information about the [products] that [they] produce[]; the statute is no bar to the free flow of business information to the purchasers of [petitioners'] products. * * * Instead the legislation is designed to interrupt the flow of information to those who conduct an economic boycott against a nation friendly to the United States, a boycott of which Congress does not approve. In this context the admonition to be cautious about a first amendment claim must be heeded.

b. If the answering of the questionnaires is viewed as speech, it must necessarily be regarded as commercial speech. It is undisputed that the information petitioners seek to furnish is information that will make them more attractive, as business partners, to the boycotting states, and that petitioners' sole purpose in furnishing the requested information would be to induce the boycotting states to continue to deal with them. See, *e.g.*, 83-1921 Pet. 10. "By describing * * * [their] qualifications, [petitioners'] sole purpose [would be] to encourage members of the [group

Arab states engaged in the boycott] to engage [them] for * * * profit." *In re R.M.J.*, 455 U.S. 191, 204 n.17 (1982). If petitioners were supplying information about a product for the sole purpose of inducing potential consumers to buy the product, they would undoubtedly be engaging only in commercial speech. See, *e.g.*, *Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 6-8; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 561-563 (1980). The fact that petitioners are seeking to "sell" not a product but their entire firms to the Arab states does not warrant a different result. As the court of appeals explained (Pet. App. 3a-5a):

> [Petitioners] concede that their desire to answer the questionnaires is motivated by economics: through this lawsuit, [petitioners] hope to avoid the disruption of trade relationships that depend on access to the Arab states * * *.
>
> * * * We do not understand [petitioners] to be arguing that they would be interested in answering the questionnaires if truthful answers would result in the imposition of economic sanctions. Rather, their interest is in maintaining their advantageous commercial relationships, and any interest in promoting truth is directly proportional to the economic result it would achieve.
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> * * * * *
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> * * * [Petitioners] are free to communicate their views about the relative merits of the Arabs' political decisions directly to the Arabs if they choose, so long as in doing so they do not furnish information about business relationships with boycotted countries or blacklisted persons in violation of the Act. However, [petitioners] do not seek to answer the questionnaire in order to influence the Arabs' decision to conduct or

> enforce a trade boycott with Israel. The Arabs' policy in conducting their boycott is irrelevant to [petitioners'] answers. They wish through their answers only to show that the boycott's sanctions should not be applied to them, because they have not violated its terms.
>
> * * * * *
>
> * * * [Petitioners'] proposed answers to boycott questionnaires would serve only to allow [petitioners] to continue to maintain commercial dealings with the Arab world. The government has traditionally regulated the area of international trade. Applying the common-sense distinction articulated in *Ohralik* [v. *Ohio State Bar Association, supra*], we hold that the [petitioners'] proposed communications are commercial speech.

If petitioners' activity is viewed as commercial speech, there is no doubt that the Export Administration Act and its implementing regulations are constitutional. The government "may * * * prohibit commercial speech related to illegal behavior." *Bolger,* slip op. 9, citing *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 388 (1973). While the Arab boycott has not been explicitly declared illegal — presumably because it consists entirely of actions by foreign states — Congress has, as we noted, explicitly declared that it is contrary to the policy of the United States.[3]

Moreover, even if commercial speech is related to legal activity, it can be regulated if the regulation serves a substantial government interest and is no more extensive than is necessary to serve that interest. *Bolger,* slip op. 9; *Central Hudson,* 447 U.S. at 564-566. The courts below correctly

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[3]The government has a particularly strong interest in regulating speech that, like petitioners', is directly solely at foreign governments.

ruled that the prohibition at issue here satisfies that test (Pet. App. 48a; see *id.* at 2a). The government plainly has an important interest in ensuring that American firms are not enlisted in aid of a boycott directed at an ally. As we have noted, and as Congress itself found, the prohibition on supplying information directly serves that objective. Petitioners do not suggest any way in which the prohibition might be more narrowly tailored without permitting an exchange of information that will prove helpful to the boycotting states.

2. Petitioners in No. 83-1957 also contend that the definition of intent contained in the regulations is unauthorized by the anti-boycott provisions of the Export Administration Act. The Act prohibits the furnishing of information "with intent to comply with, further, or support [the] boycott" (50 U.S.C. App. (Supp. V) 2407(a)(1)). The regulations provide, in relevant part (15 C.F.R. 369.1(e) (emphasis added)):

> (3) Intent is a necessary element of any violation of this part. It is not sufficient that one take action that is specifically prohibited by this part. It is essential that one take such action with intent to comply with, further, or support an unsanctioned foreign boycott. Accordingly, a person who inadvertently, without boycott intent, takes a prohibited action, does not commit any violation of this part.
>
> (4) Intent in this context means the reason or purpose for one's behavior. It does not mean that one has to agree with the boycott in question or desire that it succeed or that it be furthered or supported. But it does mean that the reason why a particular prohibited action was taken must be established.
>
> (5) Reason or purpose can be proved by circumstantial evidence. *For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he*

knowingly supplies that information in response, he clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes. On the other hand, if a person refuses to do business with someone who happens to be blacklisted, but the reason is because that person produces an inferior product, the requisite intent does not exist.

(6) Actions will be deemed to be taken with intent to comply with an unsanctioned foreign boycott if the person taking such action knew that such action was required or requested for boycott reasons. On the other hand, the mere absence of a business relationship with a blacklisted person or with or in a boycotted country does not indicate the existence of the requisite intent.

(7) In seeking to determine whether the requisite intent exists, all available evidence will be examined.

As the courts below noted (Pet. App. 36a-37a; *id.* at 2a), these regulations are fully in accord with Congress's intent. Indeed, the legislative history reveals that Congress specifically considered the problem of boycott questionnaires and resolved it in a fashion that is consistent with the regulations (S. Rep. 95-104 at 39-40):

> The most common example of prohibited information in the present context is a boycott questionnaire designed to elicit information about dealings with the boycotted country or blacklisted persons. The boycott questionnaire typically has no legitimate business purpose. It is intended to establish categories of eligibility for dealings with the boycotting country based on the subject's dealings with third parties. This provision prohibits the supply of that information in such a context.

> On the other hand, the same kind of information might be disclosed in an ordinary commercial context. For example, a general contractor or professional engineer or architect might be asked for purposes of obtaining a profile of his experience and qualifications to describe other projects in which he has been engaged. Such information might incidentally disclose whether that person has business relationships with the boycotted country or with blacklisted persons. Similarly, such ordinary commercial documents as a corporation's annual report might disclos[e] the presence or absence of business dealings with a boycotted country or with blacklisted persons. So long as the person supplying the information does not do so with intent to comply with, further, or support a boycott, no violation of the law would occur.
>
> Intent to comply with a boycott could be presumed, subject to rebuttal, where from all the circumstances it is reasonably clear that the information is sought for boycott enforcement purposes. The questionnaire, which on its face, or in the circumstances in which it is supplied, is designed only to elicit information about whether one has dealings with blacklisted persons or boycotted countries presents the clearest case. On the other hand where the information is sought in a context which does not make it reasonably clear that the purpose is boycott related, no illegal intent should be presumed. In a specific case, all the facts and circumstances, including ordinary commercial practice, would govern.

Petitioners suggest (83-1957 Pet. 4) that they cannot have the requisite intent to further the boycott because their answers to the questionnaire will prompt the boycotting nations to continue to do business with them, thus "limit-[ing] the impact of the boycott" (*ibid.*). But it is clear from

the legislative history that Congress did not intend to permit firms to second-guess its judgment that supplying information in response to a boycott questionnaire like those in issue here furthers the boycott. On the other hand, petitioners' assertion that "the regulations presume the requisite statutory intent from the fact of furnishing information" (*id.* at 6) is obviously an incorrect description of what the regulations provide; the regulations specifically state that the nature of the request for information and the context in which the information is sought are relevant to the question of intent.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In the one paragraph of the Respondents' brief in opposition, which addresses the factual foundation of the Briggs & Stratton Petition for Certiorari,

the Respondents grossly mischaracterize the stipulated facts. Respondents' brief at page 12 states that Petitioners (Briggs & Stratton) suggest that they cannot have the requisite intent to further the boycott because their answers to the questionnaire will prompt the boycotting nations to continue to do business with them, thus limiting the impact of the boycott. That characterization of Briggs & Stratton's factual position is false. Briggs & Stratton's position is that as a component supplier to customers who standardize on Briggs' components, failure to answer causes impacts on the customers, which expands and aids the boycott, while answering, which only incidentally avoids the boycott for Petitioners' products, has the main effect of permitting Petitioners to

continue to supply customers outside the boycotting countries and thereby restricts and limits the impact of the boycott.

Although the Respondents acknowledge that "the nature of the request for information and the context in which the information is sought, are relevant to the question of intent" (Respondents' brief, p. 13), the mischaracterization of the stipulated facts, which facts give meaning rather than mere lip service to the legal principles applicable in this case, is inexcusable. An analysis of the stipulated facts in "the context in which the information is sought" can lead only to the conclusion that the intent requisite for a violation of the statute cannot exist in this case. The stipulated facts with respect to Briggs &

Stratton, ignored by the courts below and mischaracterized by the Respondents here, establish the lack of intent necessary for a violation of the statute.

The Petition for Certiorari should be granted.

Respectfully submitted,

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